NO. 20640

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM GARRETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant William Garrett, Barbara Garrett, John Ford, Larry Sherman, and other persons unknown to the Grand Jury, agreed, confederated, and conspired to commit the offenses of knowingly, with intent to defraud the United States, importing and bringing marihuana into the United States from Mexico, and smuggling and clandestinely introducing marihuana into the United States from Mexico, without presenting said marihuana for inspection and without entering and declaring said marihuana, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 176a [C.T. 2-3].[1/]

Count Two charged that Larry Sherman, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 26 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought said marihuana into the United States from Mexico contrary to law. It also was alleged that appellant and defendants Barbara Garrett and Ford knowingly aided, abetted, counseled, induced, and procured the commission of that

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1/ "C.T." refers to the Clerk's Transcript.

offense [C.T. 4] .

Jury trial of appellant commenced on June 22, 1965, before United States District Judge James M. Carter. Appellant was found guilty as charged in both counts on June 25, 1965 [C.T. 5, 31].

Thereafter, on July 26, 1965, appellant was sentenced to six years in prison upon each count, to run concurrently [C.T. 42] . He filed a timely notice of appeal [C.T. 43].

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

1. Introduction of evidence allegedly unlawfully seized at appellant's residence.

2. Introduction of evidence of statements overheard by use of a listening device, in alleged violation of the privilege against self-incrimination.

3. Introduction of evidence of appellant's incriminatory statements, in alleged violation of the right to counsel.

4. Alleged unlawful search and seizure involving intrusion of electronic listening device within appellant's home without his knowledge or consent.

5. Alleged violation of the right to a preliminary hearing within a reasonable time.

6. Alleged improper comments upon the evidence by the trial Court.

7. Alleged error in the introduction of evidence relating to a previous

transaction.

(Appellant Garrett's Brief, Index).

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

Appellant has not provided this Court with a transcript of any testimony received at the hearing of any motion to suppress physical evidence seized from his residence.

B. The Trial.

In October 1964, John Arthur Ford took a vacation trip to Compostela, Mexico, about 1500 miles from Los Angeles. Before he left, appellant told him to keep his eyes open for anything available. Near the end of December, Ford wrote a letter to appellant and informed him that he had met a man who had marihuana available [R.T. 84, 94].[2/]

In reply to this letter, Ford received a letter from appellant. The letter included the following language:

> "The set-up and deal sounds great - have 300 on hand right now for three at 50, four at 40 and will have more by time you get here - at least another 2-300. Be sure to bring a bit of the pure raw Õ as I must make this gas - at least $50 for me. . . . Buy a little fly to for our mad sex f(r)iends. Watch your partner -

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2/ "R.T." refers to the Reporter's Transcript.

how does he cross over - if with you makes customs more a problem, maybe? It makes you stand out of the herd as not many Yanks bring others back with them. Dig!

"The prices you gave must be mine - if you're paying that much in Compostela - buy in tj, it's cheaper! Guadalajara goes for 20-25 right?!" [R.T. 85, 124-25].

The letter also referred to chicle, dexedrina, benzadrina, "Fenidantoin," codeine, ocelots, and "Meth." "Pure raw Ō " was pure raw opium. [R.T. 120, 124-26].

As a result of this letter, Ford received money from appellant by means of a telegraph money order, and he used the money for the purchase of 10 kilos or 10 pounds of marihuana, having an arrangement to bring back marihuana and deliver it to appellant for sale. He brought the marihuana across the border without declaring it. He delivered the marihuana to appellant in January 1965 [R.T. 68-69, 71, 73, 86].

In February 1965, appellant Garrett, Barbara Garrett, and Ford engaged in a conversation in appellant's house in Santa Monica. Ford told appellant that he had met a man who had marihuana for sale. Appellant stated that he would sell the marihuana that had just been delivered by Ford and that Ford possibly could return to Mexico in the future and get some more marihuana and deliver it to appellant [R.T. 68-69, 74-76, 87].

Approximately one week later, appellant, Garrett, Ford, Larry Sherman, and possibly Barbara Garrett, engaged in a conversation at the same residence.

Appellant stated that as soon as he sold the marihuana previously brought by Ford, he would be able to take care of some more if they (Ford and Sherman) could bring it from Mexico. Appellant offered $50 for every kilo (2-1/4 pounds per kilo) of marihuana that Ford would bring back [R.T. 77-78, 88-89] .

An additional conversation occurred near the middle of February, involving appellant, Ford, and Mrs. Garrett. Appellant gave Ford $100 as an advance for the purchase of marihuana in Mexico and told Ford that he, appellant, could handle any marihuana that Ford would bring back [R.T. 90, 115] .

Ford and Sherman later left Los Angeles on approximately February 20 and drove to Compostela in the Mexican state of Nayarit. They went to San Blas and returned to Compostela, where Ford purchased two large bags of marihuana, which were to be delivered to appellant. They returned to the United States with the marihuana and were arrested at the border [R.T. 91-93].

Sherman was driving the vehicle when it entered the United States from Tijuana, Mexico, at approximately 6:20 p.m. on March 3, 1965. Ford was a passenger [R.T. 11-12, 14-15, 26].

Ford and Sherman stated that they were bringing no merchandise from Mexico. The large bags were found in the trunk of the vehicle by Immigration Inspector Bernard Berlin [R.T. 11-13] . The bags contained 26 pounds of marihuana, having a value of approximately $1300. There was a stipulation concerning the nature of the substance [R.T. 13, 58-59, 164]. There also was testimony as well as a stipulation in regard to the "chain of possession" of the exhibits [R.T. 25-27, 30, 179-80, 182-83] .

After Sherman was arrested, he told Customs Agent Clarence Spohr that he would cooperate. They proceeded to Santa Monica in Sherman's vehicle. Some of the marihuana had been returned to the trunk of the vehicle, and a small transmitter-recording device was placed upon Sherman for the purpose of determining whether appellant was part of the conspiracy. [R.T. 28-29, 32-33, 55-56, 130-31].

Sherman went to appellant's house at approximately 3 a.m. Appellant was in the garage. Sherman told appellant, "Garrett, I have your grass." ("Grass" meant "marihuana"). [R.T. 37-38, 59, 131-33].

Appellant replied, "Where is John Ford?" The conversation continued as follows:

Sherman: "John's sick. He had to go to his house."

Appellant: "Where is the grass?"

Sherman: "It is outside in the car."

Appellant: "Well, I am not going to pick up any grass out of a car tonight at this hour. The bars are all closed. The only people on the street are black and white. I tried that once and got burnt." [R.T. 37-38]. ("Black and white" referred to police cars).

Appellant also stated that he was "too high" to do anything. The conversation continued:

Sherman: "What do you want to do?"

Appellant: "Well, bring it around tomorrow. Pull into the alley beside the garage. There is a lot of people and it won't cause any suspicion."

Sherman: "Well, what do you want me to do? Drive around all night

with this marihuana in the car?"

Appellant: "You should complain. I have got to hang onto it for two days before I can get rid of it. Tell John I have already got ten kilos sold, and he will get his money in a couple of days. I have also made a connection, a big connection, in Hollywood who deals with the movie colony, but I am going slow with that one." [R.T. 38] .

Appellant said that the connection in Hollywood could handle twice as much as they had. He told Sherman to bring it to the garage in the morning [R. T. 51, 53].

Sherman returned to the area at 9 a.m. on the following morning, parked the vehicle next to the garage, and entered the house. He had a transmitter device. Appellant told Sherman to stay, left the house, went to Ford's house, went inside, stayed a short time, returned to his vehicle, and subsequently returned home and talked to Sherman:

Appellant: "Something smells here. John Ford didn't sleep in his bed all night. I thought he was sick."

Sherman: "Well, maybe he decided to go to his girl friend's house." [R.T. 39, 61, 64-66] .

Appellant and Sherman went to a girl's house and knocked on the door. There was no response. Appellant said, "Well, like I suspected, he is not here." The subject of making delivery was again mentioned. Appellant said, "You know I won't accept delivery without the principal man involved being there." They returned to appellant's house [R.T. 140-41] .

Customs Agent David W. Hopkins obtained a warrant for the arrest

of appellant on March 4, 1965. Appellant was arrested at his residence, and the officers searched the premises. A small amount of manicured marihuana was found inside of a small book under a mat in the living room. A portion of a smoked marihuana cigarette was found in a vase in the living room. A small quantity of marihuana was found in a plastic bag in an oatmeal box on top of a refrigerator in the kitchen [R.T. 155-56, 159-162, 164, 166-67]. There was a stipulation concerning the substance and "chain of possession" of these items [R.T. 161-162, 164-65, 181-82].

Appellant testified that he had no arrangement with Ford or Sherman for bringing marihuana, that he paid Ford $100 for a tape recorder and converter, that he asked Ford to bring pre-Columbian statues and some animals back from Mexico, that he was aware that it was illegal to take the statues out of Mexico, that he thought that Sherman was attempting to deliver statues at 3 a.m. at appellant's residence, and that he had been drinking heavily and did not want to unload the statues at that time. He denied that Sherman said, "I have got your grass." [R.T. 184-85, 189-92, 199].

The officers testified that they heard appellant (or the man talking to Sherman) ask, "Where is the grass?" [R.T. 37, 229].

V

ARGUMENT

A. THE MARIHUANA OBTAINED FROM APPELLANT'S RESIDENCE WAS LAWFULLY SEIZED.

Appellant contends that a partial marihuana cigarette and a small

quantity of marihuana were unlawfully seized by officers and improperly received in evidence at his trial, in violation of the Fourth Amendment.

This objection concerns a partial marihuana cigarette found in a vase in the living room of appellant's residence, a quantity of semi-manicured marihuana found in a book under a mat in the living room, and marihuana debris found in an oatmeal box on top of a refrigerator in the kitchen [R.T. 159-60, 162, 166-67].

The search followed the arrest of appellant in the residence. The officers had a warrant of arrest [R.T. 159-60]. Since the arrest was lawful, the search of the premises at the scene of the arrest was entirely reasonable.

Harris v. United States, 331 U.S. 145, 148, 151-54 (1947);

Ker v. California, 374 U.S. 23, 41-42 (1963);

Theobald v. United States, 371 F.2d 769, 771 (9th Cir. 1967).

The search may validly extend beyond the room in which the arrest occurs.

Harris, supra, at p. 152.

Appellant cites Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); and Kremen v. United States, 353 U.S. 346 (1957). There is no similarity between the instant case and the Go-Bart and Kremen cases. Go-Bart involved the seizure of a great mass of papers, journals, account books, letter files, insurance policies, checks, index cards, etc. In Kremen the officers seized the entire contents of a cabin and transported the items seized to a point about 200 miles away. The inventory of the items seized amounted to nearly 11 pages of small print. In the instant case, the only seizure in large

quantity allegedly involved 26 motion picture reels, a fact that was not brought to the attention of the Court until after the trial was completed. Even then, there was no testimony relating to the quantity of films, although defense counsel made a remark in regard to the matter [Supplemental Transcript of Record, p. 8 of second numbered series] .

The decision in Lefkowitz, supra, was based upon the distinction between searches for mere evidence and searches for instrumentalities of crime, contraband, stolen goods, or forfeited property. This distinction does not apply to seizures of evidence.

Warden v. Hayden, United States Supreme Court, No. 480, May 29, 1967.

If the distinction applies to searches, as distinguished from seizures, this is of no assistance to appellant, because there is no evidence that the officers were searching for mere evidence as distinguished from contraband (i.e., marihuana) .

Furthermore, appellant is precluded from questioning the Trial Court's decision on the motion to suppress evidence, because he has not included, as part of the record upon this appeal, the testimony, if any, received at the hearing of the motion to suppress evidence. Issues which cannot be determined from the record upon appeal are presumed to be waived.

Springer v. Best, 264 F.2d 24, 27-28, n. 2 (9th Cir. 1956) .

The appellant must provide a sufficient record to positively show the alleged error.

United States v. Vanegas, 216 V.2d 657 (9th Cir. 1954).

In the absence of a record of testimony, it is presumed that the evidence supports the decision in the trial court.

Union Pacific Railroad Co. v. Bridal Veil Lumber Co., 219 F.2d 825, 833 (9th Cir. 1955), cert. denied, 350 U.S. 981 (1956);

Hardt v. Kirkpatrick, 91 F.2d 875, 878 (9th Cir. 1937);

Bank of Eureka v. Partington, 91 F.2d 587, 589 (9th Cir. 1937).

B. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE THE SELF-INCRIMINATION PRIVILEGE.

Appellant contends that his privilege against self-incrimination was violated by the admission of statements overheard by use of an electronic listening device without his consent.

The use of a secret radio transmitter carried upon the person of a Government agent or informant does not constitute a violation of the privilege against self-incrimination.

Todisco v. United States, 298 F.2d 208, 212 (9th Cir. 1961).

Statements are not involuntary under the Fifth Amendment merely because they are made to a Government informant who conceals his true role.

Hoffa v. United States, 385 U.S. 293, 303-04 (1966).

"In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of

coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary."

Hoffa, supra, at p. 304.

In Osborn v. United States, 385 U. S. 323 (1966), the Supreme Court recently upheld the use of a recording device secretly taken into the defendant's office by a Government informant. Appellant cites Massiah v. United States, 377 U. S. 201 (1964), in which great emphasis was placed upon the fact that the defendant was secretly interrogated after he had been indicted and had retained an attorney. These factors distinguish Massiah from the instant case, in which appellant had not been indicted and in which there is no evidence that appellant had an attorney at the time of the conversations. Appellant was merely a suspect, standing in the same relationship as the suspects who talked to the secret Government informants in Hoffa and Osborn, supra, as well as Benson v. People of State of California, 336 F.2d 791 (9th Cir. 1964). No violation of the Constitutional rights was found in those cases.

C. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE APPELLANT'S RIGHT TO COUNSEL.

Appellant asserts that his right to counsel was violated by the introduction of evidence obtained by use of the secret radio transmitter carried by Sherman.

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C. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE APPELLANT'S RIGHT TO COUNSEL.

Appellant asserts that his right to counsel was violated by the introduction of evidence obtained by use of the secret radio transmitter carried by Sherman.

However, since a defendant's Constitutional rights are not violated by use of a secret recording device carried upon the person (Osborn, supra), it is evident that the employment of the radio device also would not violate Constitutional rights.

The instant case is very similar to the facts of Grier v. United States, 345 F.2d 523 (9th Cir. 1965).[3/] In that case, Brown was arrested in connection with a package of heroin which he brought into the United States from Mexico at San Ysidro. Brown implicated Grier and agreed to cooperate with the officers and complete the delivery. Brown carried a concealed radio transmitter when he talked to Grier, and an officer listened to the conversation and later testified concerning Brown's incriminatory statements. This Court held that Grier's Sixth Amendment right to counsel was not violated:

"One is not entitled to counsel while committing his crime . . . ." (at p. 524).

In Battaglia v. United States, 349 F.2d 556, 559 (9th Cir. 1965), the defendant alleged that admission of evidence obtained by the secret use of a radio transmitting device by a police informant violated his right to counsel. This Court rejected the argument and affirmed the conviction.

3/ The facts of the case are outlined in the Government brief, No. 19472. It is proper to refer to appellate briefs in order to determine the full significance of appellate decisions, e.g., Murphy v. Waterfront Comm'n, 378 U.S. 52, 65-66 (1964); Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957).

Appellant cites Escobedo v. Illinois, 378 U.S. 478 (1964), and Massiah, supra. However, Escobedo only applies to persons who are in custody or deprived of freedom of action in a significant way.

Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Use of the secret radio device by a Government informant violates neither Escobedo nor Massiah.

Battaglia, supra, at p. 559.

D. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE THE FOURTH AMENDMENT.

Appellant contends that the introduction of evidence obtained by the use of the concealed radio device, carried upon the person of Sherman, constituted an unlawful search and seizure.

Whether or not the recording device actually entered appellant's house does not appear to be clear from the record. In regard to the most important conversation, Agent Spohr testified that the conversation occurred after "a man came to the door." [R.T. 37].

However, assuming arguendo that the device entered the building, there was no violation of the Fourth Amendment.

On Lee v. United States, 343 U.S. 747, 750-54 (1952) (radio device);

Lopez v. United States, 373 U.S. 427, 437-39 (1963) (recording device);

Osborn, supra, 385 U.S. 323 (1966) (recording device);

Benson, supra, 336 F.2d 791 (recording device);

Todisco, supra, 298 F.2d 208 (radio device).

Furthermore, merely listening to sounds constitutes neither a search nor a seizure.

Olmstead v. United States, 277 U.S. 438, 464, 466 (1928).

Appellant apparently does not contend that Sherman entered his house without permission, if he actually entered at all. The record is silent upon these points.

E. THERE IS NO EVIDENCE SUPPORTING THE CLAIM THAT APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY FAILURE TO HOLD A PRELIMINARY HEARING.

Although appellant contends that his Constitutional rights were violated by failure to hold a preliminary hearing within a reasonable time, he does not cite any portions of the record in support of this claim, and appellee has been unable to locate evidence in the record tending to support the claim.

Furthermore, assuming arguendo that there was not a speedy preliminary hearing, there is no showing that the alleged irregularity affected appellant's substantial rights at trial or prejudiced his defense in any manner.

F. THE TRIAL COURT'S COMMENTS UPON THE EVIDENCE DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Judge committed error by informing

the jurors that there was a conflict in the testimony between appellant and the Government witnesses and that the case "is largely to be determined by who you believe. What witnesses do you believe?" [R.T. 337].

The trial Judge also told jurors that the comments "are only the Judge's expressions of opinion as to the facts, and you may disregard them entirely since you are the sole judges of the facts," that "I do not intend to comment, to tell you which witnesses I believe or disbelieve," and that

> "What I have said are only my comments; you may ignore them entirely. You are the sole judges of the facts and it is not my responsibility." [R.T. 336-37].

The jurors also had been instructed that "You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." [R.T. 312].

It is clear that the trial Judge merely informed the jurors of the obvious fact that the critical issue involved the question of which witnesses to believe. Appellant complains that the Court failed to mention the testimony of John Haag, who testified that appellant engaged in speculative discussion regarding the "possibility" of importing pre-Columbian art work for sale [R.T. 241]. This testimony was relatively innocuous and unimportant, in view of the direct conflict between appellant's testimony and the testimony of Ford, Sherman, Spohr, and Bill Freeman in regard to the marihuana conspiracy. This conclusion is fortified by the fact that Haag's testimony was not emphasized in the closing arguments to the jury.

It also should be noted that a trial judge may assist a jury by commenting upon the evidence and drawing the attention of the jurors to parts of the evidence which he considers to be important.

Lovely v. United States, 175 F.2d 312, 315 (4th Cir. 1949).

Furthermore, appellant failed to object to the judge's comments during the trial [R.T. 337, 346].

Rule 30 of the Federal Rules of Criminal Procedure provides in part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

G. EVIDENCE RELATING TO THE PREVIOUS SMUGGLING TRANSACTION DID NOT CONSTITUTE ERROR.

Appellant asserts that error was committed by the admission of evidence relating to the first marihuana-smuggling transaction.

Although appellant refers to this evidence as evidence of another offense, the first venture actually was part of the crime charged in Count One of the indictment. It was part of the same conspiracy commencing "at a date unknown to the Grand Jury and continuing to on or about March 4, 1965 . . . ." [C.T. 2].

Consequently, it is unnecessary to discuss those decisions relating

to admissibility of evidence of "other" offenses, although the following decisions fully support the conclusion that the evidence would have been entirely admissible under the "other offenses" exceptions:

Klepper v. United States, 331 F.2d 694, 698 (9th Cir. 1964);

Wright v. United States, 192 F.2d 595, 596 (9th Cir. 1951);

Enriquez v. United States, 188 F.2d 313, 315-16 (9th Cir. 1951);

Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961).

Assuming that the "other offense" rule applies, appellant states that the proof must be plain, clear, and conclusive. He refers to the letter which was sent to Ford. However, the contents of the letter were plainly explained by Ford's testimony. Viewing Ford's testimony in the light most favorable to the Government, the proof of the alleged "other offense" was plain, clear, and conclusive.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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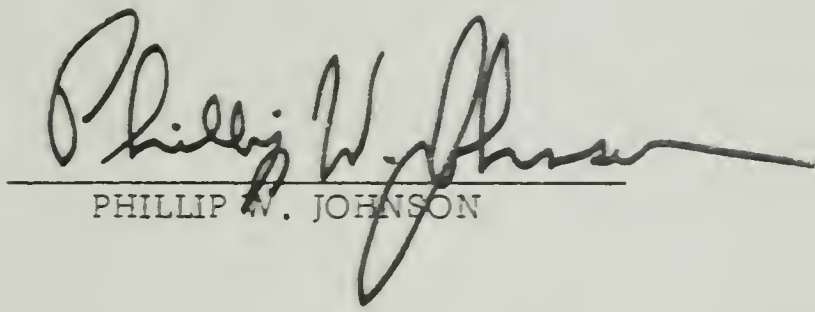
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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